**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT :**

**THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR**

**TUESDAY, THE 10TH JULY 2007 / 19TH ASHADHA 1929**

**RSA.No. 398 of 2007()**

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**(AGAINST THE DECREE AND JUDGMENT DATED 21/07/06 IN AS.48/2002 of III ADDL. DISTRICT COURT, KOLLAM AGAINST THE DECREE AND JUDGMENT DATED 24/03/2001 IN OS.154/1998 of ADDL.MUNSIFF COURT, KOLLAM0**

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**APPELLANT: RESPONDENT/PLAINTIFF:**

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**M/S AUTO AND DIESEL AGENCIES NO 10 NAHAR AND SETH INDUSTRIAL ESTATE, CARDINAL GRACIOUS ROAD, ANDHERI EAST, BOMBAY REPRESENTED BY ITS AUTHORISED REPRESENTATIVE MR.T.ANTONY S/O.M.J.THOMAS, AGED 61 YEARS, MUNPURATHU KAIKULANGARA NORTH WARD, KOLLAM WEST VILLAGE.**

**BY ADV. SRI.L.P.ARAVINDAKSHAN**

**RESPONDENTS: APPELLANTS/DEFENDANTS:**

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1. **M/S.SANIA AUTO STORES, KADAPPAKKADA, QUILON WEST VILLAGE, QUILON TALUK, REP. BY ITS PROPRIETRIX ASHA DULARI.**

2. **MRS.ASHA DULARI, NTHIN, NEAR SHAH INTERNATIONAL HOTEL, CONTONMENT NORTH WARD, QUILON EAST VILLAGE, QUILON TALUK, PROPRIETRIX OF 1ST DEFENDANT SHOP.**

3. **MR.DILEEP SHAH, MERIL HOUSE, CONTONMENT SOUTH WARD, QUILON EAST VILLAGE, QUILON TALUK.**

**BY**

**THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 10/07/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

**M.SASIDHARAN NAMBIAR,J.**

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R.S.A. NO.398 OF 2007

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Dated this the 10th day of July, 2007

JUDGMENT

Plaintiff in O.S.154/1998 on the file of Additional Munsiff Court, Kollam is the appellant. Defendants 1 and 2 are respondents. Appellant instituted the suit against third defendant contending that second respondent is the proprietrix of a proprietory concern dealing in automobile spare parts shop by name Sain Auto Stores, Kadappakkada, Kollam and third defendant is the Manager and second respondent for and on behalf first respondent purchased certain automobile items on credit basis from 7.12.1996 to 21.2.1997 under four bills with proper voucher and receipts for Rs.40,902/- and respondents 2 and 3 did not give 'C' form as stipulated in the Central Sales Tax and Rules and towards the amount due third defendant issued Ext.A5 and A6 cheques for Rs.12,483/- and Rs.12,000/- respectively drawn on

Kollam Co-operative Urban Bank Ltd and when the cheques were presented, they were dishonoured under Ext.A7 and A8 memo issued by the Bank and inspite of Ext.A13 notice sent to defendants, they did not pay the amount and therefore appellant is entitled to get a decree against all the defendants jointly and severally with costs and interest at 12% per annum. Respondents filed a joint written statement contending that they are not liable for the plaint claim and third defendant was not the Manager of first respondent and they did not purchase any parts on credit basis from appellant as alleged and they did not give any cheque and they are not liable to pay any amount and if at all third defendant is liable and therefore the suit is to be dismissed. Third defendant filed a written statement disputing his liability.

2. Learned Munsiff on the evidence of Pws.1 to 3, DW1 and Exts.A1 to A13, Exts.B1 to B4 and X1 to X4 dismissed the suit against the third defendant and granted a decree as against respondents.

Respondents challenged the decree and judgment before District Court, Kollam in A.S.48/2002. Learned Additional District Judge on reappreciation of evidence set aside the findings of learned Munsiff and held that there is no evidence to prove that respondents purchased the automobile parts as contended by the appellant and the best evidence which was available with the appellant was not produced and in such circumstance, appellant is not entitled to the decree sought for. The appeal was allowed and the suit was dismissed. It is challenged in the Second Appeal.

3. Learned counsel appearing for appellant was heard.

4. The argument of learned counsel appearing for appellant was that the trial court appreciated the evidence correctly and found that respondents are liable to pay the plaint claim and on the same evidence first appellate court should not have interfered with the findings. It was further argued that in any case an opportunity is to be

granted to the appellants to adduce necessary evidence and the suit is to be remanded.

5. On hearing learned counsel appearing for appellant, I do not find any substantial question of law involved in the second appeal.

6. The suit was filed as against three defendants contending that third defendant on behalf of defendants 1 and 2, acting as manager of the first respondent proprietory concern, second respondent being its proprietrix, purchased the automobile parts on credit basis for a total amount of Rs.40,902/- under Ext.A2 to A4 bills and towards the amount issued Ext.A5 and A6 cheques and when presented they were dishonoured and inspite of notice, the amount was not paid. Though the suit as against third defendant was dismissed, appellant did not challenge the same. As rightly found by the first appellate court that finding has become final.

7. Appellant is entitled to get a decree as against respondents only on establishing that the

articles covered under Ext.A2 to A4 bills were purchased and taken delivery of by first respondent proprietory concern. Then only being the proprietrix, second respondent is liable. When respondents disputed the purchase and contended that they did not purchase any parts as contended by the appellant, definitely the burden is on the appellant to establish that the articles evidenced by Exts.A2 to 4 were purchased by respondents. The first appellate court appreciated the evidence in the proper perspective and found that the best evidence which would have enabled the appellant to get a decree, were not produced. What was contended by the appellant was that the consignment by which articles were delivered were sent to respondents through PW3 and they were delivered. Respondents 1 and 2 denied the case. First appellate court found that evidence of PW3 establish that the lorry receipt would contain the signature of the consignee to establish that the consignment was delivered to the consignee. So

also it was admitted by PW3 that the copy of the receipt containing the acknowledgement of the consignee will be sent to the Head Office of the appellant firm and it would be available with the appellant. If those records were produced, it would have established whether the articles covered under Ext.A2 to A4 were taken delivery of by respondents as contended by the appellant. In such circumstance, for the failure to produce the relevant evidence first appellate court held that the non production of relevant and material evidence was fatal and on the insufficient evidence appellant is not entitled to the decree granted by the trial court. Those factual findings cannot be interfered in exercise of the powers of this court under section 100 of the Code of Civil Procedure. Though learned counsel appearing for appellant sought for a remand, in the circumstance of the case, it is not in the interest of justice to grant a further opportunity to adduce further evidence especially when no attempt was made by appellant to

produce the material and relevant documents before the courts below and no explanation was given for the non-production. As no substantial question of law is involved in the appeal, the appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

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W.P.(C).NO. /06

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JUDGMENT

SEPTEMBER,2006